First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

NOVEMBER 1975 VOL. 1 NO. 3

In this Issue: **The Freedom of Information Act and National Security Information, p. 3**
CHRISTINE M. MARWICK

Coming: DEC.: Controlling the Intelligence Agencies

In The News

October 7, 1975 Depositions taken in the *Halperin v. Kissinger* wiretap suit from former-Attorney General John Mitchell and former-top FBI official Cartha D. DeLoach conflicted substantially with testimony of Henry Kissinger in congressional hearings. According to Mitchell and DeLoach, the wiretaps were both initiated and terminated at Kissinger's request.

October 15, 1975 The Watergate Special Prosecution Force released its final report. The report comments that "much of the purported concern raised by the White House about "national security" was part of a plan to use that vague concept to frustrate legitimate investigations." The report recommends that each agency with significant intelligence gathering responsibilities, including CIA, IRS, and FBI, formulate and make public written policies, including the purposes for which intelligence is to be gathered, the methods to be used and the kinds of information to be sought. It also proposes that the administration publicly state its current policy on warrantless national security wiretaps, "stating the precise power claimed by the President and setting forth in as great detail as possible the factors and standards that now govern the President's and Attorney General's exercise of discretion in authorizing warrantless foreign intelligence searches and seizures."

October 16, 1975 A 72-question interrogatory was filed in D.C. District Court in the wiretapping lawsuit *Halperin v. Kissinger* requiring that Henry Kissinger answer under oath questions concerning contradictions in his own testimony before congressional hearings.

October 22, 1975 Attorney General Levi released to Rep. Robert W. Kastenmeier, Chairman of the House Civil Liberties Committee, documents that revealed that since 1939 the FBI has compiled a security index listing the names of people considered dangerous security risks in times of national emergency. At its peak, the list contained as many as 15,000 names; the one of August, 1975 listed 1,294 names.

October 29, 1975 In testimony before the Senate Intelligence Committee, NSA Director Lt. Gen. Lew Allen, Jr. revealed for the first time that NSA had provided information to other agencies based on watch lists of American citizens and domestic organizations. The Secret Service watch list included 180 names; the FBI, 1000 names; the CIA, 30 names; and DIA, 20 names. (For more details, see p. 16.)

October 30, 1975 the American Civil Liberties Union, Americans for Democratic Action, the Center for National Security Studies, the Committee for Public Justice, Common Cause, the Institute for Policy Studies, and the United Automobile Workers jointly sent a letter to President Ford asking that he notify every individual who was the "object of illegal, unconstitutional or improper activity by the intelligence community," and that they be informed of their right of access to the files under the FOIA and the Privacy Act. The letter also objected to the releasing of any names publicly without the permission of the individuals involved.

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.
THOMAS PAINE

In The Courts

September 26, 1975 *Avrech v. Secretary of the Navy*, 520 F.2d 100 (D.C. Cir. 1975). Sustaining a court martial conviction of a soldier convicted of attempting to publish a "disloyal statement," the court stated that "we will not overturn a conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant's conduct."

October 7, 1975 *Lennon v. Immigration Service*, 44 LW 2169 (2nd Cir. 1975). Deportation of Lennon overturned on statutory grounds. The court did not reach Lennon's claim that he was being deported for political reasons but warned that if Lennon's application for permanent residence were denied, his political claim will receive an expeditious hearing. "The courts will not condone selective deportation based upon secret political grounds."

October 8, 1975 *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 420 U.S. 923 (1975). The Supreme Court heard arguments wherein the government contended that release of Air Force disciplinary records was exempted under (b)(6) of the FOIA as being a "clearly unwarranted invasion of privacy."

October 22, 1975 *Knopf v. Colby*, #74-1478 (D.C. N. Va.). Pursuant to the decision of the Court of Appeals for the Fourth Circuit, the District Court entered a final order enjoining publication of all of the material deleted from the Marchetti-Marks book, *The CIA and the Cult of Intelligence*.

October 28, 1975 *Chandler, et al. v. Helms, et al.*, #75-1773. A class action suit was filed against present and former officials of NSA and CIA on behalf of organizations and individuals in the anti-war movement and other legal but "dissident" activities for declaratory and injunctive relief and money damages for illegal surveillance and counterintelligence. Plaintiffs also seek the notification of all unknown members of the class.

In The Congress

October 1, 1975 The House of Representatives voted 267-147 against the amendment of Rep. Robert N. Giaimo to publish the total sum of the CIA budget.

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October 22, 1975 Former CIA Director Richard Helms testified before the Senate Select Committee on Intelligence that a 1970 report to President Nixon, stating that the mail opening operation had been discontinued, related to FBI programs and not to the on-going CIA program. Additional testimony revealed the extent to which former Postmasters General were misinformed or uninformed about the programs.

In The Literature

Magazines

"Security" an editorial by Norman Cousins, *Saturday Review*, November 1, 1975, p. 4. Cousins presents an historical case from the Peloponnesian War through the wake of Watergate on how 'governments have a tendency to become the enemies of their own people' with cries of national security.

"Watergate on Main Street"—a Special Report, *Saturday Review*, November 1, 1975 p. 10. A series of articles by such contributors as Max Lerner, Tom Braden, Irving Kaufman and Roy M. Fisher on the ethics of American professions. Assesses self-policing in government, law and journalism and the results of a non-morality in Congress, the CIA and the White House.

"How the CIA Was Born" by Robert Hardy Andrews, *Mankind*, December, 1975, p. 14. Traces the conception of the CIA back 200 years to Thomas Jefferson and the Continental Congress.

"CIA: Denying What's Not in Writing" by Morton Halperin, *The New Republic*, October 4, 1975, p. 11. Halperin examines the CIA's ability to override, overlook and ignore Presidential and Congressional directives on operations.

"Banality of Power" by Roger Morris, *The New Republic*, October 4, 1975, p. 13. A commentary on the bureaucratic politics of the CIA within the conglomerate of government and the necessity of reconstructing the intelligence machine.

Books

Cointelpro: The FBI's Secret War on Political Freedom, edited by Cathy Perkus; introduction by Noam Chomsky (Pathfinder Press, 1410 West Street, NY 10014; paperback $1.95). Documents and commentary based on FBI Cointelpro files, mainly those released in connection with the Socialist Workers Party suit.

Government Publications

Watergate Special Prosecution Force Report, October 1975 (G.P.O. No. 027-000-00335-4, $2.65) (see discussion on page one).

Law Review Articles

"President Gerald Ford, CIA Covert Operations and the Status of International Law" by Richard A. Falk, *American Journal of International Law*, Vol. 69 (April, 1975) Falk questions the United States justifications for covert operations in foreign countries under international law.

"Consent to Electronic Surveillance by a Party to a Conversation: A Different Approach" by Donald Bradford, *Tulsa Law Review*, Vol. 10 (1975) Suggests three arguments against the legality of electronic surveillance under the Omnibus Crime Control and Safe Streets Act of 1968 and the 'assumption of risk' doctrine.

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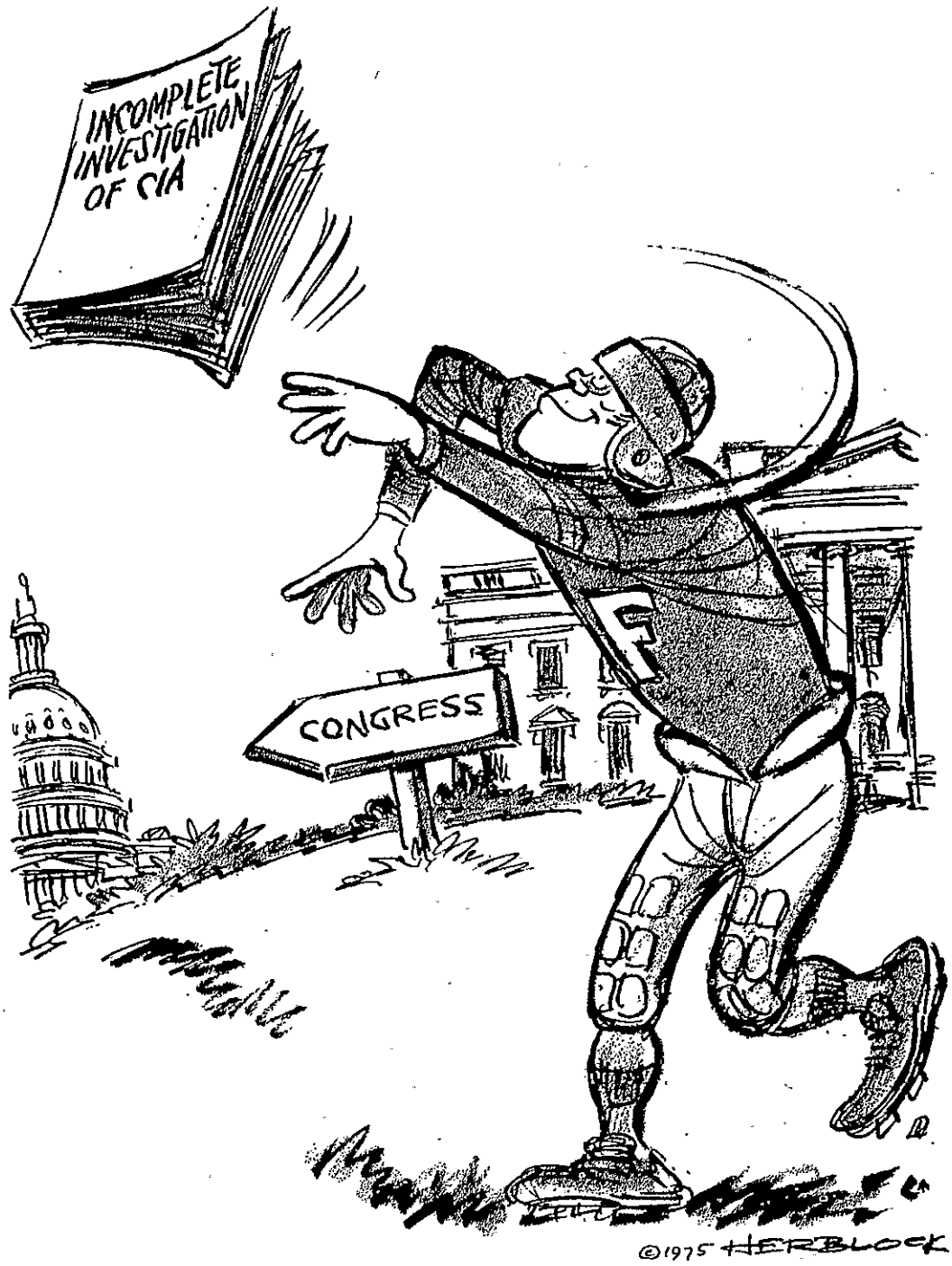
Passing Game



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Provisions of the FOIA

The original act required four things of each federal executive agency:

1) that it publish in the Federal Register information about its organization, functions, operational procedures, and general rules—the public, in other words, was to have an affirmative right to know how an agency functioned.
2) Make available to the public for inspection and copying:
   a) manuals and instructions that affect a member of the public;
   b) final opinions in ajudicated cases; and
   c) all policy statements not published in the Federal Register.
3) Make available current indexes of information relating to items 1 and 2 above for public inspection and copying.
4) Make all other existing official records, unless covered by one or more of nine specific catagories of exemptions from mandatory disclosure, available to any person requesting either access to it or a copy of it.

As a result of the FOIA, the public had a right for the first time—with the exception of only a few previous statutory rights to demand information—to see the rules, regulations, and organizational procedures of the agencies of their government. On signing the bill into law, Lyndon Johnson stated:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. * * * I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

The right to know may have been cherished and guarded, but it was scarcely a well-implemented one. In avoiding a veto the 1966 FOIA left open to the executive branch a range of tactics which made getting access to much information a long, torturous, expensive, and often impossible process.

The act left open ended the length of time an agency could take to respond to a request. Requests could grow moldy with irrelevance before being denied and making it possible to take a case to court.

Exhorbitant fees for finding, reviewing, and copying documents were another effective deterrent to the general public's use of the Act. The sums were often staggering and bore scant relationship to the actual costs to the agency. Large corporations were able to pursue their requests for information if enough money hinged on the outcome, but interested citizens or researchers were simply without the means to pay.

Many agencies insisted that documents be identified with information that no one without access to the file could possibly have, such as a specific file number. A catch-22 technique, you couldn't identify a document unless you already knew the information in it.

There was also an encompassing national security exemption which the Johnson administration had insisted on. Subsection (b)(1) held that the act did not apply to matters that were

> Specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy.

If any part of a document were classified—no matter how small a portion or whether that classification were absolutely unnecessary, the entire thing could be withheld.

The issue of the (b)(1) national security exemption reached the Supreme Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), which was a suit to compel release of information about the possible effects of a nuclear test in Alaska. Justice Stewart in a concurring opinion wrote that the act

> provides no means to question an executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been.

In other words, the 1966 Act had not indicated a congressional intent that court review whether information was in any sense *properly* classified. The mere fact of a classification stamp meant that the public had no right to the document, no matter how relevant to public debate or what the agency's motive for concealing the information. The decision went on, however, to make it clear that this absolute executive discretion had come not from the constitutional powers of the executive branch but from Congress' drafting of the law:

> Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures [for classification review]—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.

Meanwhile, public attitudes were changing. The publication of the Pentagon Papers had accelerated the erosion of the credibility of executive claims that they must have total discretion in national security matters in order to insure a successful foreign policy. The *Mink* decision was a clear indication to Congress that the Constitution allowed them to legislate a response to the problem and try to restore the balance of power among the branches of government. The revelations of Watergate—with the cynical and corrupt use of the national security rationale—dramatized the urgent need for legislative reform.

The amended FOIA, which was passed over Ford's veto on November 21, 1974 and went into effect on February 19, 1975, instituted a number of reforms designed to close the loopholes that had allowed the executive to systematically circumvent the intention of the statute.

Instead of being allowed to respond to requests at their leisure (or not at all), an agency now must reply to a request within 10 working days and to an appeal of a denial within 20 working days; it can claim only an additional 10 working days in total if there are unusual circumstances. Failure by an agency to meet any of these time limits allows the individual to go to court immediately. Furthermore, recognizing that litigation is ordinarily a lengthy process and that information is sometimes critical to public debate for only a brief period, Congress has provided that the courts should now make every effort to expedite FOIA litigation, instead of allowing it to drag on for years as it had previously.

Agencies are now required to set and publish reasonable fees for searching for and copying documents, but since the agencies now have an affirmative obligation to avoid overclassifying, reviewing is done at the agencies' expense. The act now provides that fees may be reduced or waived if the release of the information would primarily benefit the public—although this is left to agency discretion. However, fees may be charged even in cases where no records are found or released and agencies may insist on payment in advance.

The amended FOIA has also dealt with the catch-22 requirements for identifying documents by substituting a standard of being "reasonably described." As explained in the House Report (pp. 5-6) the amended act has been

> designed to insure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents. A description of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

Most importantly for national security issues, the (b)(1) exemption has been changed to allow withholding only if the documents "(c) are in fact properly classified pursuant to such Executive order." This will be discussed in greater detail below.

The act has also opened investigative files, except where it would interfere with law enforcement, court action, personal privacy, or compromise the confidentiality of sources.

The amendments have also changed the public's rights in court. Before, litigation had promised to be lengthy and expensive in even the best of cases. The act now provides that if the plaintiff wins the agency may be assessed attorney's fees and court costs—which increases the likelihood of taking the request to court. At the same time, if there is a finding of arbitrary and capricious withholding, the responsible officials are now subject to civil service sanctions.

For more information on how to use the newly amended act, the project has published two pamphlets—there is an order blank on page 15. In addition, the ACLU, 22 E. 40th St., New York, NY 10016, has available a pamphlet entitled "Your right to Government Information."

Exemptions to the FOIA

There are nine categories of information which the FOIA exempts from mandatory disclosure; agencies do have the option of releasing information covered by the exemptions and often do if it can be used in public debate to support their preferred policies.

There are three exemptions which are most frequently used to withhold information that relates to national defense and foreign policy issues. These are (b)(1)—classified information; (b)(3)—matters exempted by other statutes; and (b)(5)—inter-agency and intra-agency communications about policy alternatives. In addition, there is the (b)(7) exemption for investigatory files, which ties into the national security issues because of the massive system of files which the intelligence agencies have maintained. Each of these will be discussed in turn.

The National Security Exemption—(b)(1)

Executive Criteria

Following the *Mink* case Congress responded to the Supreme Court's invitation to amend the FOIA provisions for exempting national security information. The 1974 amendments, passed over President Ford's veto, permit withholding of classified records *only* if they are:

> (a) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and
>
> (b) are in fact properly classified pursuant to such Executive order.

The House-Senate Conference Report on the FOIA noted that this revised provision requires that "both procedural and substantive criteria" contained in the Executive order be followed. The relevant order which provides the legal basis for "properly classified" records is Executive Order 11652 on "Classification and Declassification of National Security Information and Material." This order was issued by President Nixon on March 8, 1972 after the publication of the Pentagon Papers had brought the fact of massive overclassification to public awareness.

The order provides for three categories of classified material—*Top Secret*, *Secret*, and *Confidential*. In order to be withheld under the (b)(1) exemption of the FOIA information must at least meet the classification standards for *Confidential*, which read:

> The test for assigning "confidential" classification shall be whether its unauthorized disclosure could be reasonably expected to cause damage to the national security. [As elsewhere, the order uses the term "national security" as a shorthand for "national defense and foreign relations."]

The new Executive Order 11652 was followed by an implementing directive issued on May 19, 1972 by the National Security Council and which provided more concrete guidelines to be followed. Responding (on paper at least) to the chronic overclassification problem, the directive provided:

> If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether the material should be classified at all, he should designate the less restrictive treatment.

Taken together, these two provisions constitute the *minimum substantive criterion* for proper classification and withholding of information under the FOIA: that there be no "substantial doubt that the release of the information could be reasonably expected to cause damage to the national defense or foreign relations."

The Executive order has a number of other provisions affecting the release of classified information under the FOIA. It provides that information must be declassified as soon as it no longer fits the criterion. To withhold information under the (b)(1) exemption, the agency which originated the classification of the records must make a fresh determination that the information is still properly classified. The Order also provides for automatic declassification according to a set schedule unless action is taken to specifically exempt it from that schedule. The FOIA, then, provides a way of reviewing old information so that it can in fact be released when it is no longer classifiable.

Furthermore, in order for the (b)(1) exemption to apply, the procedures provided by the Executive Order and implementing directive for handling classified information must have been followed. These include:

1. The document was classified by one of the few agencies having the authority to place an original classification on information.
2. It should be indicated on a given document whether it is subject to the Declassification Schedule of the E.O.
3. The office of origin and the date of classification should be indicated on each document.
4. "To the extent practicable" the document should be marked "to indicate which portions are not classified"; this would facilitate releasing the "segregable portions" provided for by the FOIA.

Judicial Review of Classification

This then constitutes the legal definition of classified information provided for in the Executive Order. There is, of course, a difference between the letter of the law and the way that it is put into practice. The amendments to the FOIA provide now for a system of checks and balances to ensure that the classification process is correctly followed. The courts have been given statutory authority to make their own determination in FOIA cases as to whether release of the information "could reasonably be expected to cause damage to the national security." The law does not, as yet, authorize the courts to balance the degree of possible damage from release with the importance of the public's right to know.

The Conference Report also states that the trial judge may elect an *in camera* inspection of the documents in order to determine whether the information is properly classified but that the court should give "substantial weight" to an agency's opinions on the propriety of a classification. In *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), the court interpreted this as meaning that in overruling the presidential veto Congress gave a

> vote of confidence in the competence of the judiciary . . . that judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation.

The Constitutionality of the FOIA

The constitutional question has not yet been raised by the government in any of the FOIA lawsuits currently pending before the courts. Ford's veto message was confusingly drawn, for it conceded a central point—that the judiciary has the constitutional authority to decide the "reasonableness" of a particular classification. What he balked at was allowing the courts the power of *de novo* review of the classification, i.e., the judge's fresh determination of whether the document should be classified, which goes beyond determining merely whether the classification could be conceded to be reasonable. In other words, overclassifications which did not quite meet the standard of being "arbitrary and capricious" would still be exempted from disclosure, even if *de novo* review would judge it an erroneous classification.

For the time being, the previous case law on the (b)(1) exemption has been overtaken by the amendments and judicial interpretation on the amended version has not yet taken shape. As one scholar saw it,

> The only way to secure the Supreme Court's opinion on this matter is to enact the law and await that singular case in which the Presidential standard would bring about a different result from the Congressional standard. [For a more detailed discussion, see Philip Kurland, at S19603, *Congressional Record*, November 19, 1974]

Information Exempted under other Statutes—(b)(3)

The (b)(3) exemption of the Freedom of Information Act applies to information that is "specifically exempted from disclosure by statute." This would include, for example, atomic secrets and all National Security Agency activities relating to communications and cryptography. The CIA has made expansive claims that the statutory authority of the Director of Central Intelligence to protect "intelligence sources and methods" has given the DCI an extremely broad discretion, including the right to withhold a wide range of material that would otherwise be subject to the FOIA.

The Supreme Court, in *FAA Administrator v. Robertson*, ____ U.S. ____, 43 U.S.L.W. 4833, dealt with this issue earlier this year. The Court held that, in passing the FOIA, Congress had not undertaken a reassessment of authority to withhold information that they had written into earlier statutes. As Justice Stewart's concurring opinion stated,

> [T]he only question to be determined in a district court's de novo inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might have been.

Under *Robertson* the courts will have to determine what authority to withhold information Congress granted to the CIA in the National Security Act of 1947 and the CIA Act of 1949.

Exemption of Inter-agency or Intra-agency Memorandums—(b)(5)

Subsection (b)(5) exempts from disclosure matters which are

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Senate Report No. 813 clarified the legislative intent behind this provision: "frank discussion" in writing might be inhibited if the discussion were made public, and "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decision." It protects the same values as common-law executive privilege. In effect, the exemption protects only advice, but neither the factual material in support of the advice nor the operating policy decisions which the advice may finally have generated.

In *National Labor Relations Board v. Sears*, 421 U.S. 132 (1975) the plaintiff claimed that the "final opinions" that they sought were tantamount to regulations and that keeping them secret had the same effect as the agency's establishing a "secret law." The government conceded that the exemption would not apply in such a case—what was in dispute was at what point advice becomes a "final opinion" and therefore a decision. The court held:

> Exemption 5, properly construed, calls for disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law ought to be.

Where Sears had been decided in favor of the plaintiffs, on (b)(5) grounds (and was remanded for consideration on (b)(7) grounds), in *Renegotiation Board v. Grumman Aircraft*, 421 U.S. 188, 95 S. Ct. 1491 (1975), it was held that the documents in question were part of the board's pre-decision processes, and therefore exempt.

Exemptions for Investigatory Files—(b)(7)

One of the major changes in the amended FOIA is that the individual now has access to his or her investigatory files. However, the (b)(7) exemption contains six categories of investigatory records which are not subject to disclosure under the Act. The FOIA applies to matters that are:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trail or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (D) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Since the amended FOIA offers access to personal files for the first time, case law in the area has not yet been established. The first case interpreting the new (b)(7) exemption was decided on October 10, 1975. In *Title Guarantee Committee v. NLRB* the court interpreted the exemption narrowly, stating that "the courts must examine each situation individually and determine if any of the specific harms enumerated by the statute would result from disclosure." Orders to release the Hiss and Rosenberg papers have also been issued following the revisions of exemption 7.

Ironically, the right to find out whether the government had invaded your privacy and what was recorded had a narrow scrape with the Justice Department's interpretation of the new Privacy Law, which does have an exemption for investigatory files. However, the Privacy Act contains a specific provision to prevent its use to "withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section," referring to the FOIA. The Justice Department ultimately decided that their interpretation would not hold up in court.

Implementing the FOIA

Now that the FOIA is passed, the long process of its implementation, of developing a working interpretation of the details of the law as practiced rather than as written, has begun. This process began with the Attorney General's "Guidelines and Memorandum to All Federal Agencies." The agencies in turn drew up their regulations and operating procedures in ways which they hope will shape the AG's interpretation of the law to fit their own perceived bureaucratic interests in the control of information. Following this, there is the question of how officials actually field the requests. Finally, the courts will establish the case law and refine the details of interpreting the meaning of the law in specific situations that have arisen in practice. It is here that the question of non-compliance with the law is dealt with.

For instance, there is a question whether the congressional intention that there be administrative sanctions to discourage patterns of wrongfully withholding information will in fact have any teeth in it. As Attorney General Levi's Memorandum on the FOIA law noted,

> It is thus clear that to justify commencement of a Civil Service Commission proceedings, much more is required than a judicial determination that an agency has erred in its interpretation of the act.

Presumably, this means there must be a finding of a firm and premeditated motive—difficult to prove, and likely as ineffective as the provisions in the Executive Order on classification (E.O. 11652, Sec. 13(A), March 8, 1972) which provide self-policing administrative sanctions for overclassification.

The Right to Enough Information to Litigate: *Vaughn v. Rosen*

We are ready to turn now to one of the important judicial refinements of FOIA law, the decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In this decision, the Court of Appeals attempted to remedy some of the catch-22 aspects of FOIA plaintiffs having to argue that the information is not properly exempt from disclosure in spite of the fact that, since the documents have been withheld, they cannot back up their argument with any detailed arguments. By the same token, the government defends its exemptions with generalized and conclusory justifications. In this situation, even though the government is styled the "defendant" and even though the act provides that the burden of proof should fall on the government, the contest would clearly be in the favor of the agency. As one court saw it, "those unfortunate enough to be forced into litigation with the government still face agency insistence on trial by ambush. . . ." *E.E.O.C. v. Los Alamos Constructors, Inc.* 382 F. Supp. 1373, 1375 (D.N.M. 1974).

The *Vaughn* court saw this issue as going beyond the question of any particular suit:

> [L]ack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution.

The FOIA does provide for *in camera* inspection of documents at the discretion of the court, but this places an enormous burden on the courts. Often, literally thousands of pages of documents would have to be carefully scrutinized. In *U.S. v. Alderman*, 394 U.S. 165, 184 (1969) the Court found that an analogous issue—that of examining records of wiretaps for tainted evidence—was not an appropriate burden for the courts. Such *ex parte* procedures, allowing only the government to present its full argument to the court, require a judge to play both advocate and adjudicator—again, threatening the adversary system of law. In *Vaughn*, the Court of Appeals held that:

> Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible. The burden has been placed specifically on the Government.

The solution the court has suggested is that the government be required to justify withholding information by submitting a "relatively detailed analysis in manageable segments." They suggested this consist of first indexing the material (expecting that this could often produce "segregable portions" which were not covered by any exemptions) and then following up with a detailed justification.

> This could be achieved by formulating a system of itemizing and indexing statements made in the Government's refusal justification with the actual portions of the document.

The plaintiff would no longer have to "stumble around in the dark" in trying to argue that specific segments of the documents were not correctly covered by the cited exemptions.

Discovery proceedings could, of course, go beyond the *Vaughn* decision. In other proceedings (see the article on wiretapping in the October, 1975 issue of *First Principles*) a protective order placed on the documents in question has been considered enough to safeguard sensitive government records.

Project on National Security and Civil Liberties

Freedom of Information Act Activities

Project Pamphlets, Handbook, and Conferences

The newly amended FOIA has been a major focus of the Project on National Security and Civil Liberties. Two pamphlets have been published to help people using the Act to make requests for national security information and for their personal files. (See the order blank on page 15.)

In addition, people who are interested in attending a conference or buying a handbook on litigating Freedom of Information Act cases should contact the Project Office. Sponsored by the ACLU Foundation and the Freedom of Information Clearinghouse, the first conference will be held in Washington, D.C. on December 11 and 12, with additional conferences next year in Chicago, San Francisco, and Los Angeles, and New York.

Project Requests

Beginning on February 19th, when the amended FOIA went into effect, the project has filed over 40 requests under the new procedures. Some of the documents which have been released are the Negotiating Volumes of the Pentagon Papers, background press conferences of the Secretary of State on SALT and the Middle East, assurances from the U.S. government to respond to ceasefire violations in South Vietnam, the Colby Report to President Ford on CIA domestic activities, and a range of other documents about CIA activities. The project is also keeping on file documents which have been released through the FOIA to other people. Abstracts and copies of all such documents which the Project has on file are available to the public at cost (see the order blank on page 15.)

Project Lawsuits

Requests for information under the newly amended act have, not surprisingly, met with mixed results. Non-compliance with the intent of the Act remains a problem, and the Project has so far filed seven suits to compel release of information. A list of these and selected other FOIA suits can be found at the end of this article.

These cases are for the most part in various stages of discovery. While it is too early to say what pattern judicial interpretations of the amended act will take, the fruits of discovery have, however, offered a few insights into the government's thinking about the public's right to know.

For instance, in an affidavit in *Halperin v. NSC*, Jeanne W. Davis, Staff Secretary of the National Security Council, gave the following reason why it was impossible to release even the titles of National Security Study Memoranda:

> Knowledge that the United States had undertaken a study of [a] particular issue could arouse the interest of special-interest groups in the United States which could mount a lobbying effort in the Congress and elsewhere in an effort to influence the outcome of the study and the decision on its recommendations. This would interfere seriously with the objective, dispassionate atmosphere in which these issues are analyzed and presented to the President. . . .
>
> . . . It is essential that these delicate issues of foreign policy and national security be argued in private, on the merits, with a thorough discussion of all pros and cons, without this decision-making process being publicized possibly out of context at some future date.

The NSC staff apparently sees the public's and the Congress' interests in issues of national defense and foreign policy as somehow illegitimate. Equally disturbing is the belief that a decision-making process that is isolated from the interests of the people is "objective and dispassionate." It would seem far more likely that more public input would produce a wider range of pros and cons to discuss, without one-sided executive bias. Most remarkable of all is the idea that the President is not supposed to be exposed to the influence of the people.

In the suit for the release of the CIA budget for FY76 and expenditures for FY74, we find a similar attitude toward the public's interest in knowing how their money is being spent. In the Defendents Answers to Plaintiffs Interrogatories, the CIA conceded that these figures alone would not damage the national security. But they went on to say

> Release of a single year budget figure alone would inevitably lead to demands for more detailed breakdowns by component or activity for monies appropriated or spent. . . .

In other words, the CIA is fighting the release of these figures not because the sums would damage the national security but because a precedent might whet the appetite of the public to know more. The FOIA, however, does not provide an exemption for information which might generate other requests.

In *Halperin v. Department of State*, a suit for deletions from Kissinger background press conferences on SALT, the deposition of George Vest revealed some interesting facts about the executive branch's approach to classification. First, the deletions were classified only after they were reviewed because of the FOIA request. Before that, they had been available in the State Department press office to journalists. In addition, when Mr. Vest classified them, he had not heard of the standard for classification that was set out in the Nixon Executive Order. He had applied the standard for "Confidential" in the earlier Eisenhower Order, "that it could damage the national security," instead of the stricter criterion that the release be "expected to cause damage to the national security."

The Nixon Order had been intended as a solution to the problems of massive overclassification, but it is not difficult to see why it has had virtually no effect on the release of information—apparently few in the executive branch have considered it important enough to read.

In other cases, the government response to *Vaughn* motions has yielded useful information. In *Klaus v. NSC*, the government provided the most detailed discussion available of the secret intelligence agency charters (NSCIDs), and in *Borosage v. CIA* the government provided interesting information on CIA files on political assassinations.

There have been problems in the executive branch's approach—officials have apparently been unable to understand that the public has a *legitimate* interest in national security issues, that the public has a statutory right under the FOIA to harmless information, and that the public has a right to have officials who at least know what are the basic standards for concealing information. But the prospects in court under the amended act are promising. Looking over the government's arguments against disclosure in *Klaus v. NSC*, the court ordered the government to file a *Vaughn* showing, saying: "The government offers no reason why the court and the plaintiffs must continue to stumble around in the dark."

It is a welcome recognition that in the amended FOIA Congress has now given both the public and their courts of law the right to examine the prerogatives of secrecy of the executive branch of government and to make them adhere to their own rules.

Freedom of Information Act Lawsuits

FOIA Suits Filed on Behalf of the Project on National Security and Civil Liberties

(Suits are brought by the ACLU unless otherwise indicated)

Halperin v. State, #75-0674, to compel the release of deletions from a Kissinger press backgrounder dealing with SALT; motion for summary judgment filed November 5, 1975.

Halperin v. Colby, #75-0677, for the Colby Report to President Ford on CIA activities, filed by William Dobrovir; the suit has been largely successful in that most of the report was released. A motion for summary judgment for legal fees is pending.

Halperin v. Colby, #75-0676, to release the CIA budget figures for FY76 and expenditures for FY74; discovery has been completed; cross motions for summary judgment are to be filed.

Halperin v. National Security Council, #75-0675, to release the titles of National Security Study Memoranda (NSSMs) and Decision Memoranda (NSDMs) (Freedom of Information Clearinghouse case); discovery is continuing.

Borosage v. CIA, #75-0944, to compel the release of materials given to the Rockefeller Commission on CIA assassination the government has asked that the case be stayed pending a decision on whether to bring any criminal prosecutions.

Klaus v. National Security Council, #75-1093, to release National Security Actions 10 and 10/2, the presidential memoranda establishing the National Security Agency and all NSCIDs (National Security Council Intelligence Directives) since 1948; discovery is continuing.

John D. Marks v. CIA, #75-1735, to compel release of deletions from the investigatory and security files on him.

Other ACLU FOIA Lawsuits

Charles O. Porter, #75-150 (D.C. Oregon), a suit by a former member of Congress for release of deletions in the investigatory files maintained on him.

Weinstein v. Levi, #2278-72 (D.C.D.C.), a suit on behalf of Prof. Allen Weinstein for the records in the Hiss and Rosenberg cases; in litigation for 3 years now, the case has been a groundbreaker in obtaining the release of documents from the FBI.

Freedom of Information Clearinghouse Suits

(Dealing with the (b)(1) exemption)

St. Louis Post-Dispatch and Richard Dudman v. FBI, #75-1025, to release information about FBI counterintelligence activities over the past 10 years which were directed at the *Post-Dispatch* or reporter Dudman personally; plaintiffs are moving to compel compliance with a *Vaughn* order (index submitted by government was sufficient but the required justification was inadequate.)

Phillippi v. CIA, #75-1265, a Rolling Stone reporter's suit for records of attempts by Colby to get the media to suppress events relating to the Glomar Explorer; the CIA refuses to confirm or deny the existence of such records although they have admitted in another court action that the U.S. constructed, maintained and operated the ship. The court has permitted the government to file affidavits *in camera*.

Leading FOIA Decisions

Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). Dealt with exemptions (b)(1) and (b)(5). The holding on (b)(1) was overridden by congressional amendment.

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Held that plaintiffs have a right to detailed indexing of the information withheld and to justification for the withholding which goes beyond mere conclusory statements.

National Labor Relations Board v. Sears, 421 U.S. 132, 95 S. Ct. 1504 (1975). Held that "final opinions" (as to whether or not to prosecute) are not exempt under exemption (b)(5) of the Act, but that an attorney's working-product in contemplation of litigation is.

Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 95 S. Ct. 1491 (1975). Held that information "the disclosure of which would impinge on the Board's predecisional processes" was exempt under (b)(5) of the Act.

Federal Aviation Administration, Administrator v. Robertson, ____ US ____, 43 USLW 4833 (1975). Held the (b)(3) exemption for information "specifically exempted from disclosure by statute" meant that Congress was authorizing the status quo in regard to the force of previous statutes authorizing withholding even if based on a broad standard such as public interest and had not intended to reassess in the FOIA the merits of such other statutes.

Zweibon v. Mitchell, 516 F.2d 494, 642, 643 (1975). In dicta commented that the FOIA amendments overruled *Mink* and gave the courts a vote of confidence in judicial competence to deal with matters pertaining to foreign affairs and national defense.

Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cir. 1974). Held that "the burden is on the agency to demonstrate . . . that the documents withheld under the claim of the §552(b)(1) exemption were properly classified" pursuant to the Executive order; discovery granted in order to determine the propriety of classification.

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Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Sourcebook: Legislative History, Texts, and other Documents, Committee on Government Operations, U.S. House of Representatives, Subcommittee on Government Information and Individual Rights; and the Committee on the Judiciary, U.S. Senate, Subcommittee on Administrative Practice and Procedure, March 1975 (GPO Stock No. 052-070-02805-0, $4.80)

Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, February 1975 (GPO: Washington, D.C. 20402, $.90). (This is included in the 1974 *Sourcebook*, above.)

Law Review

NOTE "In Camera Inspection Under the FOIA," 41 *U. Ch. L. Rev.* 557 (1974).

NOTE "The FOIA After Seven Years," 74 *Colum. L. Rev.* 895 (1974).

"Symposium on the 1974 Amendments to the FOIA," 25 *Am. U. L. Rev.* 1 (Dec. 1975)

Access Reports, bi-weekly newsletter ($117/year) and reference service ($168/year) ($237/year for both) covering legislative, regulatory, and judicial actions affecting the FOIA, the Privacy Act, the Federal Advisory Committee Act, other related federal statutes, and relevant state laws governing public access to government information. 2814 Pennsylvania Avenue, N.W., Washington, D.C. 20007.

(continued from page 16)

Army intelligence appears to have been the first agency to grasp the possibilities of harnessing SHAMROCK to spy on the activist groups in the United States. Many individuals in these groups communicated abroad often, travelled abroad and sent cables home, and were in contact with Americans living abroad and with foreign governments. What better way to learn about them than to read their private cable traffic? And so Army intelligence, with the knowledge of the United States Intelligence Board, asked the NSA: give us the cable traffic to and from or about the following individuals and groups.

Other Agencies then got into the act, and NSA began to service a series of watch lists for CIA, FBI, the Secret Service, and the Bureau of Narcotics and Dangerous Drugs. In all Project MINARET as it was called involved some 1650 names.

As a result of its own interests and those of other agencies, NSA read and analyzed some 150,000 messages per month and distributed thousands of these to other agencies. One set of these messages, as described in the Rockefeller Commission Report, was sent to the CIA as part of the CHAOS operation and concerned the activities of the anti-war movement. In 1974, CIA officials decided that it might be illegal for the Agency to have the information and sent this material back to NSA.

In 1973 with the Watergate revelations crashing around them, NSA officials began to get nervous and asked the agencies supplying watch lists to be sure the names on them were proper. Then the new Attorney General Elliot Richardson wrote to the NSA Director suggesting that under the *Keith* decision of the Supreme Court banning warrantless electronic surveillance of American citizens the program might well be illegal. And so MINARET came to an end but SHAMROCK continued until May 15, 1975 when, under the heat of the first serious Congressional probes into NSA, the Defense Department terminated the program.

The legality of the operation will be tested in a class action suit filed by the ACLU on behalf of those who came under surveillance in the CHAOS program and whose cables were read by NSA. The suit filed in the District of Columbia on Oct. 28, 1975 seeks injunctive relief and substantial damages.

As with the other Agencies, NSA now says it is over—the illegal activities have been stopped. But questions remain. NSA no doubt has the technical capacity to interpret cables without the cooperation of the cable companies. What has come to an end? Just SHAMROCK, or all efforts to monitor the cable traffic of Americans?

Another task of NSA is to seek to break the diplomatic codes of foreign governments. In light of SHAMROCK and MINARET one is entitled to ask, must ask, whether any such codes are in fact broken when they reveal the private activities of American politicians, businessmen, and activists, and, if they do, what is done with that information?

NSA is briefly in from the cold, but it and the other intelligence agencies remain convinced that their national security responsibilities make them immune to the contraints of the Bill of Rights. Until they are effectively disabused of that notion none of us will be secure in our constitutionally guaranteed civil liberties.

Point Of View (continued)

Contributions to the Project are tax deductible; they should be made out to either the American Civil Liberties Union Foundation or the Fund for Peace, c/o Project on National Security and Civil Liberties, 122 Maryland Avenue, N.E., Washington, D.C. 20002

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Point Of View

NSA: More Abuses

MORTON H. HALPERIN

In the past few weeks another intelligence agency has come in from the cold. The National Security Agency, the super-secret code-making-and-breaking arm of the Defense Department, was forced for the first time to discuss its activities in public. The results are what anyone who has followed these matters has come to expect: serious violations of constitutional rights and of the laws of the land carried out with apparent knowledge of illegality but with a strong sense that the national security required and excused the violations of the law. Typically, the operations moved during the sixties from small scale efforts focussed on foreign agents to a massive effort targeted on the anti-war movement.

The massive illegal domestic activities of the NSA had its roots in the wartime censorship of outgoing cables. In 1947 the Defense Department persuaded the cable companies to renew the arrangement with assurances that the President and the Attorney General wanted it done and would protect the companies from any harm. From then until May of this year when the program ostensibly came to an end, every cable sent abroad has been available to the NSA. The cable companies never received assurances from any other President and there is no evidence that any President since Truman knew of the program.

In the 1960s two dramatic changes took place in SHAMROCK, as the program was called. One was in technology and the other in the government's perception of its right to know.

The change in technology meant that all cables leaving the United States were put on tape and the cable companies could give the entire day's output to NSA by giving them the tape. In turn NSA's sophisticated computers could search through the tapes for any combination of words and then print out the targeted cables. The shift in interest came from other agencies and was part of the massive effort of the sixties and early seventies to learn about the anti-war, black nationalist, and other protest movements developing in the United States.

(continued on page 15)

First Principles
is published by the
Project on National
Security and Civil
Liberties, which is
sponsored by the
American Civil Liberties
Union Foundation and the
Center for National
Security Studies of the
Fund For Peace.

122 Maryland Avenue, N.E., Washington, D.C. 20002
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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON,
MAY 13, 1798